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# THE PLANS FOR THE NEW RULES OF CRIMINAL PROCEDURE\*

By JAMES J. ROBINSON<sup>1</sup>

Reporter for the Committee

THE statute by which Congress provided for rules of procedure prior to appeal in criminal cases in Federal courts became law on June 29, 1940. "This Act represents," says Wigmore, "the most notable forward step, for a century past—or more—in the rationalizing of criminal procedure in the United States." Chief Justice Hughes, recently retired, has shown in many ways his deep personal interest in the work of the Committee. Chief Justice Stone likewise has aided the Committee, and particularly the Reporter, in a very special way, by furnishing him his working quarters. Acknowledgment is due also for the great assistance which the Committee is receiving from the pioneering work of the Advisory Committee on Rules for Civil Procedure. Time and again we observe that the work of the Civil Rules Committee has prepared the way for the Committee on Criminal Rules.

Looking to activities in the future, I wish to describe the status and plans of the Criminal Rules Committee. I shall discuss (I) The Committee's legal background, (II) the Committee membership, its coordinating committees, and its headquarters, and (III) the Committee's plan of work.

## (I) The Committee's Legal Background

The terms of the Act of June 29, 1940 (Public No. 675—76th Congress, c. 651, s 1, 48 stat. 1064, 28 USCA s 723a) are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall

\*This article is the ninth published in consecutive issues of the JOURNAL in advocacy of the program of the Special Committee on Improving the Administration of Justice. It is a part of an address at the Annual Judicial Conference for the Second Circuit, New York City, June 26, 1941.

1. Member of the Special Committee on Improving the Administration of Justice, American Bar Association; and Director of the Institute of Criminal Law Administration, Indiana University.

have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States Court for China, and in proceedings before United States commissioners. Such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect.

On February 3, 1941 the Supreme Court entered an order (312 U. S. 717, 85 L. ed. 495) the terms of which are as follows:

ORDER: It is ordered:

1. Pursuant to the Act of June 29, 1940 . . . the Court will undertake the preparation of rules of pleading, practice and procedure with respect to proceedings prior to and including verdict, or finding of guilty or not guilty, in criminal cases in district courts of the United States.

2. To assist the Court in this undertaking, the Court appoints the following Advisory Committee to serve without compensation. (See ABA JOURNAL, March, 1941, p. 182, for personnel of the Committee.)

3. It shall be the duty of the Advisory Committee, subject to the instructions of the Court, to prepare and submit to the Court a draft of rules as above described.

4. During the recess of the Court the Chief Justice is authorized to fill any vacancy in the Advisory Committee which may occur through failure to accept appointment, resignation, or otherwise.

5. The Advisory Committee shall at all times be directly responsible to the Court. The Committee shall not incur expense or make any financial commitments except upon the ap-

proval of the Court as certified by the Chief Justice or upon his order during a recess of the Court.

## (II) The Committee's Membership, its Coordinating Committees, and its Headquarters

The 18 individual members of the Advisory Committee represent the District of Columbia and 11 states, extending from New York and Connecticut to California, and from Minnesota to New Mexico. They include lawyers, law teachers and law writers. Their professional experience includes services as judges, federal and state district attorneys, assistant attorneys general, defense counsel and lawyers in the general practice of law. The law teachers and law writers include an adviser in the drafting of the Code of Criminal Procedure of the American Law Institute, the editor of the authoritative American journal in the field of criminal law administration, and the joint author of a standard cyclopedia on federal procedure and practice.

It was the desire of the Chief Justice and of the Court that offices for the Advisory Committee, and particularly for the Reporter, be established in the Supreme Court building. This has been done, through the special assistance of Mr. Justice Stone, who placed at the service of the Reporter two rooms of his suite in the Supreme Court Building.

The staff in the Reporter's office now consists of 8 members, of whom 6 are engaged full time in the work of the Committee. One member has been provided through the kindness of the Attorney General from his staff. The Director of the Administrative Office of the United States Courts has provided the Committee with an assistant secretary and has aided it in making arrangements for working space and in recruiting its staff.

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### (III) The Committee's Plan of Work

The work of the Committee includes three types of activity. First, the existing law on each step in federal criminal procedure is carefully studied.

Second, recommendations as to changes, if any, in each procedural step are thoroughly considered. The sources of the recommendations are: (1) Federal Judges, in their reported opinions, in addresses and law journal articles, and in communications made directly to the Advisory Committee; (2) United States Attorneys; (3) Attorneys General of the United States, in their formal opinions and in their annual reports; (4) practicing lawyers, as individuals and as members of committees appointed by Federal Judges and by officers of Bar Associations; (5) the crime surveys, namely, the National (Wickersham) Commission on Law Observance and Enforcement (1931), and the survey of Cleveland (1922), of Missouri (1926), of California (1927 et seq.), of Minnesota (1927), of New York (1928 et seq.), of Illinois (1929), of Virginia (1931), and the Report of the Attorney General's Conference on Crime (1934); and, finally, (6) the provisions incorporated in the American Law Institute Code of Criminal Procedure (1931), in the New York Proposed Revision of the Code of Criminal Procedure (1939), and in the criminal procedure of the several states and of England.

The third type of the Committee's activity is the preparation of successive drafts of criminal rules.

The first full meeting of the Advisory Committee was held in the Supreme Court Building on February 21, 1941. The next meeting of the Committee will be held early in September. Subsequent meetings will be held more frequently as required to consider the recommendations from judges, lawyers, and other citizens and from organizations, and to consider successive drafts of proposed rules.

The first tentative draft of the Rules is now being prepared by the Reporter. It will serve as a basis for the deliberations of the Advisory

Committee at its September meeting. Succeeding drafts will be prepared in the light of the criticisms and suggestions which will be received, at first from the Advisory Committee and later, when public distribution may be authorized by the Supreme Court, from both the Advisory Committee and also from the cooperating committees and from all other sources.

What will be the provisions of the final draft of the Rules of Criminal Procedure? There is of course no direct answer to that question at this time. The Committee is finding, however, that certain topics with which the proposed Rules may deal are especially prominent in the recommendations made to the Committee by judges and lawyers.

These procedural topics which are attracting special attention and the other procedural details, both existing and proposed, which require attention must be tested by the standards of legal principles which are established as fundamental law and which are demanded as individual rights in this country. These standards have come to be summarized by the expression "due process of law," although, strictly speaking, it is by clauses other than the due process clause of the Bill of Rights of the Federal Constitution that some of these fundamental rights have been established.

When a court of the United States is considering the question of whether or not a certain statute or rule or proceeding, whereby a person is deprived of life or liberty or property under color of the criminal law, meets the general test of conformity with the principle of due process of law, what specific test does the court apply to the statute or rule or proceeding in question? The general question—is it due process?—is seen to be reducible to one or more of five specific questions, depending upon what detail, or details, of criminal procedure is involved. The specific question in regard to a particular provision or case, therefore, may be one of the following questions. Is the notice an adequate notice? Is the hearing a fair hearing? Is the tribunal

an impartial tribunal? Is the procedure an orderly procedure established by law? Is the judgment a conclusive judgment?

Each provision and step in criminal procedure, whether actual law or proposed rule can and should be tested by one or more of these five questions. If a question is answered in the negative, the proposed provision must be rejected from further consideration as a possible provision in a code of criminal rules. On the other hand, if a question is not answered in the negative, the proposal is in accord with due process of law (if consistent with the other, more specific guarantees of the Bill of Rights) it is entitled to consideration for inclusion in a code of rules of criminal procedure.

*[Here follows a discussion of certain proposals which have been suggested to the Committee and observations as to what question or questions may eventually be applied to each proposal as a test of its consistency with due process of law.]*

The Advisory Committee will join me, I am sure, in telling every judge and lawyer in this country that we want each of them to give the Committee their recommendations for any or all details of the proposed federal rules of criminal procedure. We are sincerely convinced that our success or failure as a committee will be determined by our ability to win the confidence and constant support of the Bench and Bar. The committee is not out to reform anything or anybody. It recognizes fully the exemplary work which is done by the federal courts in the administration of justice in this country. Members of the committee know firsthand by personal experience and observation the labors and the anxieties of the judge, of the prosecuting attorney, and of defense counsel in the every day work of the courts, both federal and state. I am sure that the Committee will not endorse any proposal the soundness of which is not established beyond a reasonable doubt by experience in the courts and by recommendations of judges and lawyers.